IN THE SUPREME COURT OF THE STATE OF MONTANA
CASE NO. DA 10-0097

LARRY DIMARZIO,

Plaintiff/Appellant & Cross-Respondent,

vs.

CRAZY MOUNTAIN CONSTRUCTION, INC., a Montana corporation, F.L. DYE COMPANY, a Montana close corporation,

Defendants/Respondents & Cross-Appellants.

COMBINED ANSWER AND REPLY BRIEF OF RESPONDENT/CROSS-APPELLANT CRAZY MOUNTAIN CONSTRUCTION, INC.

On Appeal From The Eighteenth Judicial District Court, Gallatin County
Honorable Mike Salvagni Presiding
Cause No. DV-04-596

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2. Did the district court err by allowing the jury to reach the question of a breach of contract between DiMarzio and Defendant F.L. Dye when everyone agreed no contract existed between these parties?

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STATEMENT OF THE CASE

This action arose out of a dispute between Appellant/Cross-Appellee Larry DiMarzio (hereinafter DiMarzio) and Appellee/Cross-Appellant Crazy Mountain Construction (hereinafter "CMC"), and Appellee/Cross-Appellant (hereinafter F.L. Dye) regarding building an atrium and a remodel of the DiMarzio kitchen.

In 2003, DiMarzio decided to add an atrium to the north side of his home. DiMarzio hired architect Van Byran to draw the plans. On May 14, 2003, DiMarzio

entered into a Cost-Plus contract with CMC. The Cost-Plus contract did not have any terms regarding the air control systems. The Cost-Plus contract required DiMarzio to pay CMC all costs incurred to complete the project plus a 12 % contractor's fee. Bridger Glass installed the atrium's aluminum frame. F.L. Dye installed the air control system. S.L Pynn installed the heating system.

Disputes arose over the air control system. DiMarzio contacted CMC to demand CMC pressure F.L. Dye to correct the alleged problems with the air control system. CMC refused to pressure F.L. Dye as CMC did not believe problems existed with the air control system.

Eventually, DiMarzio told CMC that he would no longer pay CMC until it did something about F.L. Dye's work. In addition, DiMarzio made unreasonable demands upon CMC. With DiMarzio's decision to stop payment to CMC, CMC stopped work.

On May 28, 2004, CMC sent a letter to DiMarzio which ended CMC's relationship with DiMarzio. In response to that letter, DiMarzio called Butch and Ryan to tell them he was sending his New York attorneys to Montana to inflict as much pain as possible on Butch and Ryan.

After the relationship ended between CMC and DiMarzio, DiMarzio complained that the heating, humidification, and air conditioning systems were defective. Additionally, DiMarzio alleged that the atrium leaked. Finally, DiMarzio alleged that CMC and Bridger Glass' work was negligent to the atrium was not

earthquake proof.

On May 25, 2005, DiMarzio, filed the Amended Complaint, naming as Defendants F.L Dye, S.L Pynn, CMC and Bridger Glass and Windows, Inc. (Docket # 28). By the Amended Complaint, DiMarzio alleged CMC was negligent and breached the contract by its failure to perform its work in a workmanlike manner, and by its failure as the general contractor to properly supervise the subcontractors. (Final Pre-Trial Order, DiMarzio's Contentions, ¶¶ 17-19, 21, Docket # 111). CMC brought a counterclaim against DiMarzio in which CMC alleged DiMarzio breached the Cost Plus contract for his failure to pay for materials and services provided by CMC. (CMC's Answer to Amended Complaint, Counterclaim, and Demand for Jury Trial, p. 5, Docket # 35). On April 21, 2008, CMC filed an Offer of Judgment in the amount of $10,000. (Docket # 117). DiMarzio rejected the offer.

After six days of trial, on September 1, 2009, the jury returned the following in the special verdict form.

1. CMC did not breach the contract with DiMarzio.

2. DiMarzio breached the contract with CMC and awarded damages in the amount of $5361.78.

3. CMC was negligent and awarded DiMarzio damages in the amount of $7,902.44.

4. F.L. Dye was not negligent.

5. A contract existed between F.L. Dye and DiMarzio.

6. DiMarzio breached the contract with F.L. Dye.

7. The Jury awarded $10,740.00 to F.L. Dye.

8. The Jury found that F.L. Dye was not negligent. (Special Verdict, Docket # 187, DiMarzio Appendix #1).

After the verdict, CMC moved for costs and attorney's fees. (Docket # #190, 191, 192, 195). In its October 26, 2009, Order the district court awarded CMC its attorney's fees for the time it spent on the contract claim. (District Court's October 26, 2009, Order on Attorney's Fees, Docket # 209, DiMarzio Appendix #2).

The district court held the attorney's fee hearing on December 17, 2009. On February 3, 2010, the district court held CMC was not entitled to attorney's fees except for $6,943.00. (Findings of Fact, Conclusions of Law and Order Re: Attorney Fees, Docket # 220, DiMarzio Appendix #3).

Also on February 3, 2010, the district court issued the Judgment. (Judgment Docket # 221, DiMarzio Appendix #4). By the Judgment, DiMarzio was awarded $7,902.44 on the negligence claim. CMC was awarded $5,361.78 on DiMarzio's breach of contract. The district court ordered DiMarzio to pay CMC's costs in the amount of $3,548.80, and attorney's fees in the amount of $6,943.00. The district court offset the $7,902.44 owed to CMC, leaving a balance to CMC in the amount of $7,951.14. (Judgment, Docket # 221, DiMarzio Appendix #4). The Judgment was entered on February 5, 2010. (Entry of Judgment, Docket # 222).

DiMarzio filed his Notice of Appeal on March 3, 2010. (Notice of Appeal, Docket # 230). On March 10, 2010, CMC filed its Notice of Cross-Appeal. On May 14, 2010, the parties completed Rule 7 mediation. During the mediation, DiMarzio reach a settlement with Bridger Glass, and Bridger Glass was dismissed from the case.

STATEMENT OF FACTS

CMC is a small family business which is operated out of the Butch Keyes' home in Livingston, Montana. (Tr. Day One, 200:3-12). Butch's sons, Ryan and Levi, work for CMC. (Tr., Day One, 200:16-19).

Butch was raised on the family ranch. (Tr., Day Two, 90:1-13). After the family sold the ranch, Butch managed a number of ranches throughout Montana before starting CMC. (Tr., Day Two, 90-95).

Butch learned carpentry from his father. (Tr., Day Two, 91:12-16). Additionally, during his many years as ranch manager Butch worked on construction projects, such as remodeling homes and building structures for the ranch operations. (Tr., Day Two, 92:6-25; 93:4-9; 94:15-25).

CMC started it business building calving sheds, remodeling homes, and eventually building homes. (Tr., Day Two, 96:18-25; 97-98). Butch believes maintaining CMC's reputation in a small community is important because CMC gains business by reputation. (Tr., Day Two, 97:3-12).

DiMarzio is an experienced and successful businessman, who owes DiMarzio, Inc. DiMarzio, Inc. manufactures guitar pickups, guitar cables, and guitar straps. (Tr., Day Three, 127:1-5).

DiMarzio was raised in New York City, but moved from New York to Bozeman in 1992-1993. DiMarzio lives at 48 Gardner Park Drive in Bozeman. DiMarzio paid $495,000 for the home at 48 Gardner Park, and since moving into the home, DiMarzio paid for renovations to the house equal to the amount of the home's purchase price. (Tr., Day Three, 128:9-17, 130:8-13).

In 2003, DiMarzio decided to add an atrium to the north side of his home. Architect Van Bryan drew the plans for the atrium. (Tr., Day Three, 131:1-11). On May 14, 2003, DiMarzio entered into a Cost Plus contract with CMC to build the atrium. CMC normally uses a Cost Plus contract in its business relationships. (Tr., Day Two, 103:1-14). Under a Cost Plus contract the contractor is paid for the costs incurred on the job, plus a predetermined contractor's fee.

By the terms of the Cost Plus contract DiMarzio agreed to pay CMC all costs incurred to complete the project plus a 12 % contractor's fee. CMC wanted a 15% contractor's fee. DiMarzio wanted a 10% contractor's fee. Eventually, DiMarzio and CMC agreed to a 12% contractor's fee. (Tr., Day Two, 107:1-9).

After CMC ended its work on the atrium, DiMarzio hired R&R Taylor to renovate the upstairs of the DiMarzio home. Mr. Russ Olsen, the owner of R&R

Taylor, charged DiMarzio a 15% contractor's fee. According to Russ Olsen, R&R refused to negotiate down from the 15% fee. (Tr., Day Two, 178:13-19, 204:6-21).

The Cost Plus contract states that "Crazy Mountain will construct the structure according to the plans." (Tr., Day Three, 8:14-23; DiMarzio Appendix, #5, p. 1, Scope of Work). DiMarzio testified that he understood CMC would construct the atrium according to the plans. (Tr., Day Three, 9:4-20).

Ryan Keyes was the foreman on the DiMarzio job. Ryan's duties included making sure materials and tools were on the job for the crew to carry on the day-to-day activities, as well as manager and coordinate with subcontractors regarding their work on the project. (Tr., Day Four, 96:7-13). Before April 2004, DiMarzio describes his interaction with Ryan and Butch as professional and cordial. (Tr., Day Three, 273:19-22). Ryan testified he had a very good relationship with Mr. and Mrs. DiMarzio. (Tr., Day Four, 96:11-18).

CMC began work on the DiMarzio project on May 30, 2003. (Tr. Day One, 224:4-9). After CMC started work on the atrium, upon DiMarzio's request, CMC agreed to remodel the DiMarzio kitchen. Therefore, while building the atrium, CMC remodeled the DiMarzio kitchen. (Tr. Day 4, 96:23-25; 97:1-10).

The "heavy" construction on the atrium started at the end of July 2003. (Tr., Day Two, 127:21-25). CMC completed its work on the atrium by January 22, 2004. (Tr., Day Two, 128:2-7). After January 22, 2004, only the heating, air conditioning

and humidification systems needed to be completed. (Tr., Day Two, 128:9-15).

Problems over the air control systems started to arise in March of 2004. Eventually, Mr. Schaeffer with F.L. Dye called DiMarzio at 8 o'clock in the morning and told DiMarzio that he owed him money and that if DiMarzio did not pay him DiMarzio was going to be sued. (Tr., Day 2, 301:4-8). DiMarzio hung up on Schaeffer. (Tr., Day 2, 301:10-12).

After the phone call, DiMarzio told Butch Keyes that "we had a problem and I (DiMarzio) probably didn't really want Schaeffer back on the job." (Tr., Day 3, 109:21-25). DiMarzio instructed Butch to not pay F.L. Dye. (Tr., Day 3, 112:10-13). Additionally, after the phone call with Schaeffer, DiMarzio instructed Butch to write a letter to Mr. Schaeffer regarding issues with the air control systems. (Tr. Day Two, 301:13-19). Butch agreed to write the letter, explaining why at trial:

> A. I was trying to keep - - make resolve with the job, keep our client, yes, get our subs on the job to finish up to make the system operational, make him aware - - make Mr. Schaeffer aware that DiMarzio had some concerns. (Tr., Day Two, 80:11-15).

Butch's letter, which was entered in evidence as Exhibit 41, was never sent to Schaeffer. Instead, DiMarzio dictated to CMC's secretary over the phone what he wanted in the letter to Schaeffer. (Tr., Day Two, 82:3-10). At trial, DiMarzio was questioned about his input to the letter which was eventually sent to Schaeffer. DiMarzio input in the letter are the comments critical of F.L. Dye's work. (Tr., Day

Two, 110, 12-17; 101:2-8).

Butch testified that DiMarzio generally wrote the letter that is Exhibit "43." (Tr., Day Two, 126:18-25). However, Butch testified that while he signed the May 11, 2004, he regretted signing it. (Tr., Day Two,127:1-10). Butch testified that he signed the letter written largely by DiMarzio because he was trying to "resolve this job so that everybody could [be] done and off the job." (Tr., Day 2, 127:4-9).

Butch regretted signing the May 11, 2004, letter because he disagreed with DiMarzio's statement in the letter that the F.L. Dye system had failed. Instead, Butch testified the system needed to be "tweaked" in order for it to be fully operational. (Tr., Day 1, 210:11-17; Day 2, 12:4-9).

With the stalemate between Schaeffer and DiMarzio, with the atrium complete, and with no guarantee of payment, Butch decided it was time to end CMC's relationship with DiMarzio. On May 28, 2004, Butch sent DiMarzio a letter which ended the relationship between DiMarzio and CMC. The May 28, 2004, letter was admitted at trial as Exhibit "20." (Tr., Day One, 244:16-25).

In response to the May 28, 2004, letter, DiMarzio on June 2, 2004, called Butch and Ryan. (Tr., Day Two, 135:18-21). During the phone call, DiMarzio threatened Butch that he was going to inflict as much pain upon Butch as he could with his New York attorney. (Tr., Day Two, 136:8-21). DiMarzio testified that if he could have inflicted as much pain with his New York attorney, he would have, but DiMarzio

discovered his New York attorney could not practice law in Montana. (Tr., Day Three, 50:10-24). Similarly, to Schaeffer, DiMarzio let it be known cost was no object when waging litigation. DiMarzio stated the following to Mr. Schaeffer:

> "I am no stranger to litigation. In fact, I would relish the chance to testify on this entire tawdry episode in a court of law as well as a Court of Public Opinion. As an indication of my resolve I have recently spent $250,000 in legal expenses to avoid settling what I deemed a frivolous case brought against my company when the case could have been settled out of court for a fraction of that amount." (Tr., Day Three, 107:19-25; 108:1-5).

Butch took DiMarzio's threat seriously and more than ever wanted to get away from the job. (Tr., Day Two, 136:22-24). However, even with the threat, Butch offered to come back to the job. (Tr., Day Two,137:1-6). In response to Butch's offer, DiMarzio told Butch to not come back. (Tr., Day Two,137:17-25).

On page 5 of the Cost Plus contract under billing information it states "in the event payment for an invoice is not received by Crazy Mountain within 15 days of the date of invoicing, Crazy Mountain will have the right to cease all work and remove itself, employees, subcontractors, and equipment from the job until payment is received and all problems are corrected." (Tr., Day Two, 108:5-21). DiMarzio paid CMC for its March 2004 invoice. Since March 2004, DiMarzio has not paid CMC's bill. The invoice attached to the May 28th letter which is Exhibit "20" shows CMC is owed $12,787.78. (Tr., Day Two,130:20-24).

A. DiMarzio's Allegations Regarding the Atrium.

DiMarzio testified the atrium leaks, it has condensation problems, it freezes, and it is not earthquake proof. (Tr., Day Two, 244:11-15). DiMarzio testifies that he does not use the atrium in the summer because it is too hot, and he does not use it in the winter because it is too cold. DiMarzio testified he uses the atrium about 20 days a year. (Tr., Day Two, 280:6-14). The rest of the time with all the condensation issues DiMarzio finds it "extremely annoying and not a pleasant place to spend time living." (Tr., Day Two, 280:13-16). DiMarizo testified he has not torn down the structure due to expense, and he did not want to destroy evidence. (Tr., Day Two, 244:18-21).

While the jury found CMC was negligent, the jury generally rejected DiMarzio's claims. The jury did not find for DiMarzio on most of his clams, because the evidence did not support DiMarzio's claims.

1. Leaks.

DiMarzio alleged and testified at trial that the atrium leaked. Out of all the parties and witnesses who testified at trial, only Mr. and Mrs. DiMarzio testified seeing leaks in the atrium. (Tr., Day Three, 34:12-20; Tr., Day Three, 172:7-24).

Mrs. DiMarzio testified the atrium leaked. However, Mrs. DiMarzio testified that the leaks continued even after R&R Taylor repaired the area of the roof which, according to Mr. and Mrs DiMarzio, leaked from the alleged faulty work of CMC. (Tr., Day Two, 212:1-17). Mrs. DiMarzio testified:

Q. Do you still see the ones between the sunroof and the house?

A. Ya. I don't always catch them, but there is a light floor underneath and when it leaks it leaves brown spots on my floors, so I don't use the room very much. But I'll walk through and say oh, its spotted again, its leaked again and I'll wipe it up. (Tr., Day Three, 173:5-12).

. . .

Q. Okay. I want to make sure I have this right. I thought I heard you testify that you saw drops of water recently coming down from the transitional area between the atrium and house.

A. No, I didn't see drops of water. I see it on the floor.

Q. In that area?

A. Yeah.

Q. Okay. Have you talked to R&R Taylor about that?

A. No. (Tr., Day Three, 180:1-12).

Ryan testified there was a leak before the structure was completed. A piece of glass was not installed when water came in from and a "cloud burst" which occurred while CMC was building the subroof . (Tr., Day Four,148:6-17). After the structure was completed, Ryan never saw any leaks. (Tr., Day Four, 148:15-18).

Upon complaints from DiMarzio that the atrium leaked, Ryan and Tom Finley with Bridger Glass took a garden hose and sprayed the atrium with a constant stream of water. After that, Ryan put a sprinkler on the atrium roof and ran the sprinkler on the roof for two hours. Tom and Ryan could not find any leaks after pouring water all over atrium. (Tr., Day Four, 112:18-25;113:1-14). Butch Keyes testified that there were no leaks after the structure was complete. (Tr., Day Two, 47:1-6).

Bridger Glass ordered the DiMarzio aluminum structure from Northwest Glass. (Tr., Day Five, 151-154). Mr. Tuhy was the president of Northwest Glass when Northwest provided the aluminum structure to Bridger.

Upon the invitation of Bridger, in February 2004, Mr. Tuhy inspected the aluminum structure. (Tr., Day Five, 164:9-16). At the site Mr. Tuhy discovered a considerable amount of condensation. (Tr., Day Five,162:4-12). Mr. Tuhy did not see any evidence that it was leaking from the exterior into the interior. (Tr., Day Five, 162:12-16).

2. Condensation.

According to DiMarzio, depending on the weather conditions, condensation occurs inside the atrium. (Tr., Day Three, 83:1-5). Mrs. DiMarzio testified condensation occurs in the atrium, especially in the winter. (Tr., Day Three,174:12-18). The condensation occurs even though F.L.Dye's systems are not being used. (Tr., Day Three, pp. 81-83). DiMarzio testified that he humidified the home before the atrium was built and continues to humidify the home. (Tr., 284:15-25; 285:1-3).

Schaeffer testified he saw condensation in the atrium, and was not surprised to see condensation because he knew the levels of humidity were high from time to time. (Tr., Day Four, 75:15-21). Schaeffer stated the condensation was significant because he saw it running down the concrete walls. (Tr., Day Four, 76:13-18). The condensation in the atrium would disappear or be reduced if DiMarzio adjusted the

humidity level. (Tr., Day Five, 148:1-6).

3. Earthquake Proof.

DiMarzio was in the 1991 Los Angeles earthquake. DiMarzio described how Los Angeles was shut down for five days from the earthquake, and it scared the "pants off of" him. (Tr., Day Two, 235:18-22). From this experience, DiMarzio wanted the atrium earthquake proof. DiMarzio alleged at trial the atrium was not earthquake proof.

DiMarzio consulted with two architects regarding designing the atrium. Bitnar, the first architect, recommended a US aluminum structure. (Tr., Day Two, 275:22-25). DiMarzio told his second architect, Van Byran, that the sunroom must be "earthquake proof." (Tr., Day Three, 132:9-23;133:6-15). Bryan prepared plans with the knowledge that the sunroom structure needed to be earthquake proof. The plans included a steel tubular frame inside an aluminum frame. (Tr. Day Two, 112:16-25; 113:1). Bryan also recommended using a U.S. Aluminum product for the atrium. (Tr., Day Three, 135:1-25, 136:3-7).

DiMarzio wanted the aluminum frame attached to the steel frame. However, Byran did not draw a connection as part of the plans. (Tr., Day Two, 113:9-17). Eventually, during the construction of the atrium, Byran came to the work site, took out a piece of paper and drew a rough connection. (Tr., Day Two, 23:4-14; 24:1-5).

DiMarzio testified he would talk "with someone" to manufacture the connection. (Tr., Day Three, 24:5-14). However, DiMarzio learned his machinist could not manufacture the connection. (Tr., Day Three, 25:1-9). DiMarzio testified there was nothing stopping him between 2003 and August 27, 2009, from finding someone to make an attachment, and attaching the aluminum to steel frame. (Tr., Day Three,139:8-16).

During the trial, DiMarzio's structural engineer expert Mr. Ed Wilson testified he could design the connection necessary to connect the aluminum structure to the steel structure. However, no one asked him to design the connection. (Tr., Day Three, 261:11-18). Wilson testified to design the connection it would take some time. Unlike Byran, Mr. Wilson testified he is not going to sketch it out on a "napkin." (Tr., Day Three, 262:1-12).

Finley installed the aluminum frame. Finley testified did not make or install the brackets because he is not a steel fabricator, or an engineer. (Tr., Day Four, 168:14-17). However, Finley would have attached the brackets if given to him. (Tr., Day Four, 165:22-25; 166:1-5). Finley testified that it was not necessary to attach the aluminum to the steel structure. Finley has never attached the aluminum structure to any substructure. (Tr., Day Four,166:21-25;167:1-4). U.S. Aluminum does not send out instructions to attach its aluminum frame to another structure. (Tr., Day Four,167:3-6). Wilson testified that nowhere in the US Aluminum literature that he

read did it recommend the aluminum structure be attached to the steel. (Tr., Day Three, 261:1-10).

DiMarzio wanted the atrium to meet the Southern California earthquake standards. DiMarzio testified he does not know if the original house meets the Southern California earthquake standards. (Tr., Day Three, 137:1-6). If there is an earthquake in Bozeman, DiMarzio does not know if the house will come down and not the atrium or if the atrium will come down and not the house or neither will come down or they will both come down. (Tr., Day Three, 137:7-15). DiMarzio does not know whether the aluminum structure by itself is earthquake compliant. DiMarzio testified that it could be. (Tr., Day Three, 142:9-16).

4. Freezing.

DiMarzio testified that the atrium freezes. DiMarzio's heating complaint was directed at S.L. Pynn and Bridger Glass, both of whom DiMarzio dismissed from the lawsuit. Finley told DiMarzio the U.S. Aluminum structure was the best design to be used in the State of Montana for the winter conditions. (Tr., Day Two, 276:3-15).

DiMarzio testified that the heating system installed by S.L. Pynn did not work and he had to replace it. (Tr., Day 3, pp.27-28). S.L. Pynn also installed floor heaters to supplement the heat in the atrium. After the first night of the floor heaters running, DiMarzio told CMC to remove the heaters. Mr. DiMarzio did not like the noise the heaters made. (Tr., Day Two, 117:1-24). The heaters provided supplement heat in the

atrium. DiMarzio never replaced the heaters. DiMarzio sued S.L. Pynn, but eventually settled with S.L. Pynn. (Docket # 105).

SUMMARY OF ARGUMENT

DiMarzio raises four issues on appeal. The first issue concerns the exclusion of DiMarzio's expert from testifying in his case in chief. This issue relates to F.L. Dye, and will be covered by F.L. Dye in its response brief.

DiMarzio's second issue concerns whether the district court erred when it allowed the jury to determine whether an implied contract existed between DiMarzio and F.L. Dye. CMC response is the district court did not err when it decided to allow the jury to determine this issue as the record supported giving this issue to the jury.

DiMarzio's remaining two issues concern whether the district court erred when it gave Jury Instruction Nos. 23 and 24. As will be argued, the district court did not abuse it discretion as the record supported giving Instruction Nos. 23 and 24.

On cross-appeal CMC argues the district court erred by denying CMC the bulk of its attorney's fees. In its October 26, 2009, Order, the district court held that as a matter of law CMC was the prevailing party for purposes of awarding attorney's fees. Therefore, the district court should have granted CMC its reasonable attorney's fees.

ARGUMENT

1. Whether the District Court Abused its Discretion When it Prevented DiMarzio from Calling William M. Lynch, P.E. as an Expert in His Case in Chief?

Whether the district court abused its discretion when it prevented DiMarzio from calling William M. Lynch P.E. as an expert in his case in chief is an issue between DiMarzio and F.L. Dye. Therefore, the response to this issue is left to counsel for F.L. Dye.

2. The District Court Did Not Err by Allowing the Jury to Determine Whether DiMarzio and F.L. Dye had a Contract.

DiMarzio argues that the district court erred by disregarding "the parties' testimony, as well as the letters, bills and statements from Dye and CMC that confirmed that the contractual relationship with Dye was with CMC." (DiMarzio Opening Brief, p.19). DiMarzio believes the district court erred by allowing the jury to determine whether F.L Dye and DiMarzio entered into a contract.

DiMarzio premises this argument on the district court's decision to give jury instruction No. 22. (DiMarzio Opening Brief, p. 19). Instruction No. 22 stated:

> An agreement may be established by the conduct of the parties without any words being expressed in writing or orally, if, from such conduct, it appears that the parties mutually intended to agree on all the terms. The same elements are essential to an implied contract as are essential to an express contract. (DiMarzio Appendix, # 15, Instruction No. 22).

This Court reviews a district court's decision to give or refuse a proffered jury instructions for an abuse of discretion. *Giambra v. Kelsey*, 2007 MT 158, P 28, 338 Mont. 19, 162 P.3d 134. An abuse of discretion occurs if the district court "acted arbitrarily without the employment of conscientious judgment or exceeded the bounds of reason, in view of all the circumstances, ignoring recognized principles resulting in substantial injustice." *Clark v. Bell*, 2009 MT 390, P16, 353 Mont. 331; 220 P.3d 650. When this Court reviews whether a particular jury instruction was properly given or refused, the Court considers the instruction in its entirety, as well as in connection with the other instructions given and with the evidence introduced at trial. *Kiely Const. LLC v. City of Red Lodge*, 2002 MT 241, P62, 312 Mont. 52, 57 P.3d 836.

DiMarzio argues the record did not support giving an implied contract instruction. (Tr., Day Five, pp. 183-186:1-6; 292:8-22). However, after an objective examination of the record, the only conclusion which can be drawn is the district court's decision did not abuse its discretion when it gave Instruction No. 22.

The following exchange occurred over DiMarzio's Motion for Judgment as a Matter of Law on F.L. Dye's implied contract claim.

> THE COURT: - - so the facts are the facts.
> The law is whether or not according to Mr. Guza there was an implied contract here.
>
> MR. KAUFFMAN: Well, there's - - there would have to be consent on all material terms.

THE COURT: No, those are considerations for the jury to decide.

MR. KAUFFMAN: There is no evidence there was any meeting of the minds from any party, Your Honor, you get to the jury that there was a meeting of the mind on this so it was a question of law at this stage.

THE COURT: There may have been because the system was installed.

MR GUZA: And consideration was paid.

MR. KAUFFMAN: Not to - - not - - there's no money that went to his client, sir, zero. There's no consideration between the parties. You can't - - the four elements - - a predicate doesn't exist.

THE COURT: That's why he's bringing the lawsuit for the breach.

MR. KAUFFMAN: He's admitted there isn't a contract to be breached. That's why - -

THE COURT: No, no, no, no.

MR. KAUFFMAN: All right. I don't have anymore.

THE COURT: He's being asked about this written contract here. He's all along alleged that there's a contract between him, between Dye and your client. He's made that allegation all along.

MR. KAUFFMAN: Yeah.

THE COURT: He's saying that there's a - - he has a contract with CMC doesn't necessarily include there being a contract also with your client

MR. KAUFFMAN: First of all, I don't know if that's legally true, but most important - -

THE COURT: Well, I don't know either because of the way you brought the lawsuit. So I'm not sure here myself.

MR KAUFFMAN: Okay. Let me see, I think the easiest way to describe this is in the context of a direct verdict. Is there any evidence with the win behind him and the (inaudible) is in his favor that there was a contract between these two parties. In order to have a contract implied or express there needs to be four elements.

THE COURT: You have two parties.

MR. KAUFFMAN: Identifiable parties.

THE COURT: You have to have consent.

MR. KAUFFMAN: Consent. Mutual consent.

THE COURT: Mutual consent.

MR. KAUFFMAN: And there is no evidence of mutual consent.

THE COURT: Well, it can be circumstantial.
Go ahead, go ahead - -

MR. KAUFFMAN: Consideration. There's no consideration given between the parties. He gave nothing to - - there's no consideration. And you know it's a peppercorn even. So - - but it has to go both ways. DiMarzio gave nothing and agreed to give nothing to his client. There's no contract. He may have an enrichment claim, but - -

THE COURT: But he's going - -

MR. KAUFFMAN: And the fourth is it has to be legal object.

THE COURT: Okay, Mr. Guza?

MR. GUZA: There's an offer and the offer is set forth in the proposals. The proposals were signed by DiMarzio. The work commenced. After the work commenced, DiMarzio was presented with the bill from Crazy Mountain Construction. Itemized on that bill it said F.L. Dye and then there was two bills and I don't have the specific number. One was the 16,000, the other one was the 7,4-something.

DiMarzio paid both those bills to CMC. So that consideration flowed from DiMarzio to pay for the work that F.L. Dye did. It completes the elements of the contract, Your Honor.

THE COURT: The motion is denied. (Tr., Day Five, 182-186:1-6).

During the settling of jury instruction, DiMarzio's counsel agreed that the implied contract theory was valid if the record supported it.

THE COURT: He's got two theories going on here.

MR. KAUFFMAN: Yeah, I know.

THE COURT: He's got a contract theory and he's got an unjustment (sic) theory. He's got unjust enrichment theory. He's got a contract and a tort theory going on both.

MR. KAUFFMAN: I understand.

THE COURT: And you can do that.

MR. KAUFFMAN: I absolutely – you can do it if you have the facts to support it. (Tr., Day Five, 292).

As the district court recognized, the record contained ample evidence to raise an issue whether an implied contract was formed between DiMarzio and F.L. Dye. Foremost, no express contract existed between CMC and DiMarzio regarding the design and installation of the air control systems. The Cost-Plus contract did not contain any provisions regarding designing and installing the air control systems for the atrium. Butch Keyes testified:

> A. At the beginning of the job, as per the plans that we were provided, air conditioning and humidification are not on those plans and so I didn't address it. It's not in our scope of work and our contract and so I didn't even - - it never crossed my mind that we needed that. When we receive a set of plans its usually complete and we portray the things we have to do there. (Tr., Day Two, 49-17-25; 50:1-6).

After CMC started to build the atrium, Butch Keyes asked DiMarzio what he intended to do with the air control systems.

Mr. Keyes testified:

> At some point in the - - at the beginning of the job after it was started, in passing I asked DiMarzio what about air conditioning, and this was a glass structure and it was going to get hot, and what about air conditioning, and his comment to me was "well, you're the general contractor. You take care of that." And at that point I looked to F.L. Dye or looked for a subcontractor that could handle the job and researched it out and found F.L. Dye. (Tr., Day Two, 50:18-25; 51:1-2).

The express documents regarding the air control system were between F.L. Dye and DiMarzio. Prior to install the air control systems, F.L. Dye drafted proposals which DiMarzio received. F.L Dye sent to DiMarzio a proposal for the humidification system in the atrium. DiMarzio signed F.L. Dye's proposal. (Tr., Day Three, pp.70-72).

Additionally, DiMarzio changed the terms of the air control plans, and specifically instructed Schaeffer to make the changes. Schaeffer's initial plans called

for an 18 inch discharge duct. (Tr., Day Five, 41:21-23). Schaeffer delivered the plans to DiMarzio for his review. (Tr., Day Five, 41:24-25;42:1-3). After Schaeffer dropped off the plans he received a call from DiMarzio in which DiMarzio requested that a sample of the 18 inch duct be delivered to his home. (Tr., Day Five, 42:9-14). Schaeffer left a sample of the 18 inch duct in the atrium. (Tr., Day Five, 42:17-22). DiMarzio called Schaeffer and said that the 18 inch duct looked like a garbage can. (Tr., Day Five, 43:7-13).

After DiMarzio rejected the 18 inch duct, Schaeffer, DiMarzio and Ryan Keyes met. At that meeting DiMarzio requested the duct be reduced to 12 inches. (Tr., Day Five, 45:7-17). From this meeting, a plan was developed. Schaeffer testified:

> Q. Okay. Well, why did you agree to modify this system from 18 inch to a 12 inch system if it was going to be experimental?
> A. Well, we had a plan. We would reduce the duct, determine the air flow, add the toe kicks for the air, the additional air, and that was it. (Tr. Day Five, 58:7-14).

After the meeting Schaeffer went back to his office and changed the plans, putting the 12 inch duct in place of the 18 inch duct. (Tr., Day Five, 49:1-8). Schaeffer wrote on the plans the use of 12 inch duct was experimental. DiMarzio understood that the 12 inch duct was experimental. (Tr., Day Five, 52:12-19).

Later, DiMarzio complained to Schaeffer that the levels of humidity in the

atrium were not sufficient. Schaeffer called DiMarzio to set up a meeting regarding the humidity level. DiMarzio told Schaeffer that he would give him 15 minutes to discuss the problem. (Tr., Day Five, 78:6-15). Schaeffer gave DiMarzio two proposals to correct raise the humidity.

Schaeffer testified:

> A. Okay. The jist is I said well, we can kill two birds with one stone. Put in buster (check) fan, we won't need the toekicks, put a heating coil in the duct work, and take the fans out of the marble floor. That was the jist. (Tr. Day Five, 80:11-16)

Again, Schaeffer went back to the office to figure it all out. (Tr. Day Five, 80:20-25). Schaeffer sent a letter to Butch regarding the changes to the system. Schaeffer never got a response. (Tr. Day Five, 81:15-25). Eventually, Keyes told Mr. Schaeffer in an oral conversation that DiMarzio did not want to spend the money on the new proposal. (Tr. Day Five, 82:11-25; 83:1-4).

Based on the record, the district court got it right. The evidence supported the notion two contracts could exist. DiMarzio entered into a Cost Plus contract with CMC which covered the issue of hiring subcontractors for the job. DiMarzio also entered into an implied contract with F.L. Dye regarding the design and installation of the air control systems in the atrium. Therefore, the district court did not abuse its discretion in giving Instruction No. 22.

3. The District Court Did Not Err by Giving Instruction No. 23.

DiMarzio argues that the district court erred by giving Instruction No. 23. On page 25 of his opening brief DiMarzio incorrectly recited Instruction No. 23. DiMarzio wrote:

> Performance by a contractor of a CMC Contract in accordance with the provisions of the contract entitled a contractor to payment from the owner. (DiMarzio Opening Brief, p. 25).

Instruction No. 23 as given by the district court stated:

> Performance by a contractor of a construction contract in accordance with the provisions of the contract entitles a contractor to payment from the owner. (DiMarzio Appendix, # 15).

The first problem with DiMarzio's position is DiMarzio did not object to jury Instruction No. 23 at trial. (Tr., Day Five, 293:12-24). DiMarzio argues he objected "prior to trial" to Instruction No. 23. (DiMarzio Opening Brief, p. 25). However, the rule is [f]ailure to object to a jury instruction at trial constitutes a waiver of the opportunity to raise the objection on appeal." *Seltzer v. Morton*, 2007 MT 62 P 54, 336 Mont. 225, 154 P.3d 561.

If DiMarzio can overcome this procedural problem, DiMarzio's argument "that the jury was confused when the district court unreasonably and improperly gave the jury the impression that a contractor has some special elevated status over owners in contract disputes with Instruction No. 23" is not supported by the record. (DiMarzio

Opening Brief, pp. 25-26).

Instruction No. 23 from its plain language did not in any way give the impression that a contractor "has some special elevated status over owners in contract disputes." DiMarzio does not explain how Instruction No. 23 elevated the contractor over the owner.

DiMarzio correctly points out that Instruction No. 23 is adopted from the Prompt Payment Act. DiMarzio argues the district court by giving Instruction No. 23 erred because the Prompt Payment has a jurisdictional threshold of $400,000.

Again, DiMarzio did not cite to any authority for this position. Certainly, a party is allowed to and must offer jury instructions which instruct the jury. Rule 51, M.R.Civ. P. tells parties to give a jury instruction on an issue of law or otherwise forego objecting to the failure to give a jury instruction. *See*, Rule 51, M.R.Civ.P.

Finally, DiMarzio agues Instruction No. 23 somehow caused confusion to the jury because the jury found CMC was negligent but inexplicably according to DiMarzio did not find CMC breach the Cost-Plus contract. No one, including DiMarzio, knows how the jury reached its verdict. DiMarzio speculates as to collective thought process of the jury. DiMarzio's speculation is insufficient to reverse the district court's decision to give Instruction No. 23.

4. The District Court Did Not Improperly Comment on Evidence When It Gave Instruction No. 24.

DiMarzio argues that based on the evidence it was improper for the district court to give Instruction No. 24. Again, the record does not support DiMarzio's position. Instruction No. 24 states:

> A subcontractor is a person who is hired to produce a specific result but who is not subject to the right of control of the general contractor as to the way he brings about that result. Generally, a person who hires an independent contractor is not liable for his actions. (DiMarzio Appendix # 15).

Instruction No. 24 is pattern instruction 10.10. *See*, MPI 2d 10.10. In this case, the jury received a complicated special verdict form because DiMarzio asserted multiple claims against three defendants which concerned the co-defendants work on the project. To assist the jury in deciding the case and clarify issues, Instruction No. 24 was given. (Tr., Day Five, 283:12-210).

Additionally, the record supported the instruction. DiMarzio named Mr. Russ Olsen as his expert. Olsen is the owner of a R&R Taylor. *Supra.* pp 6-7. By his expert disclosure, DiMarzio informed all parties that Mr. Olsen had vast experience in the construction industry. DiMarzio expert disclosure read in part:

> Mr. Olsen is a principal shareholder in R&R Taylor Construction, Inc. (the "Company") and has been since 2001. The Company is involved in general contracting in Southwest Montana. It has experience in constructing residences, commercial buildings

> as well as industrial buildings. Mr. Olsen has been involved in the construction industry since 1980, beginning as a laborer, later becoming a carpenter, then a superintendent/foreman and eventually an owner of the Company. In the more than 20 years he has been involved in the construction industry (sic) has had the opportunity to become familiar with general standards of construction in Southwest Montana. (DiMarzio Expert Disclosure, Docket # 71).

Olsen testified that on a R &R Taylor job the subcontractor guarantees its own work. (Tr., Day Two, 205:11-25; 206:1-4). Therefore, the standard is, at least according to DiMarzio's expert, the subcontractor guarantees its own work. With this record, the district court did not abuse its discretion giving Instruction No. 24.

Closing out his argument, DiMarzio argues he was prejudiced by Instruction No. 24 because without this instruction the jury could have found CMC beached the Cost-Plus contract by failing to properly supervise or coordinate F.L. Dye or other subcontractors. (DiMarzio Brief, p. 28). The problem with DiMarzio's position is F.L. Dye, the only subcontractor in the case, was not included in the Cost-Plus contract. Counsel for DiMarzio in his closing acknowledged F.L Dye was not included in an express contract. (Tr. Day Six, 32:1-12). Therefore, DiMarzio was not prejudiced by Instruction No. 24.

CMC'S CROSS-CLAIM

A. The District Court Erred by Denying CMC Its Attorney's Fees.

The only issue CMC raised on cross-appeal is whether the district court erred by denying CMC the bulk of its attorney's fees. In its October 23, 2009, Order, the district court awarded CMC , as the prevailing party, its attorney's fees for the time it spent on the contract claim. The district court, after applying the holding in *Doig v. Cascaddan*, 282 Mont. 105, 112-113, 935 P.2d 268 (1997), held:

> In the exercise of its discretion in this case, the Court applies the reasoning of *Doig* in determining the "prevailing party" on the contract claim. DiMarzio brought the lawsuit. Crazy Mountain filed an Offer of Judgment in the amount of $10,000.00. DiMarzio rejected the Offer of Judgment. The Offer of Judgment was in an amount greater than what DiMarzio gained at the trial. DiMarzio sought over $130,000.00 in damages from the jury. The jury found that Crazy Mountain did not breach the Contract. The jury found that DiMarzio breached the Contract. From DiMarzio's breach, the jury awarded $5,361.78 to Crazy Mountain. Therefore, the Court concludes that on the contract claim Crazy Mountain is the prevailing party. (District Court's October 26, 2009, Order on Attorney's Fees, Docket # 209, p.5, DiMarzio Appendix # 2).

After issuing its October 26, 2009, Order, the district court set a hearing to determining the reasonableness of the attorney's fees. The district court stated in its order that the issue at the attorney's fee hearing would be whether CMC's attorney's fees could be segregated between time spent on the contract claim versus the negligence claim. (District Court's October 26, 2009, Order on Attorney's Fees,

Docket # 209, p.5-6, DiMarzio Appendix # 2).

DiMarzio stipulated that CMC's attorney's fees were reasonable and could not be segregated, thereby putting to rest the issues the district court intended to address at the attorney's fee hearing. The district court recognized the DiMarzio's stipulation in its February 3, 2010, Order. The district court wrote:

> In this case, DiMarzio agreed that the "contract and negligence claims were so intertwined that it was not possible to separate the work on the two claims." *See* Pl.'s Proposed Findings of Fact and Conclusions of Law and Or. Regarding Atty.'s Fees (Jan. 15, 2010), Finding of Fact No. 16. At the hearing DiMarzio's counsel also agreed that it is not possible to "parse" out the attorney's fees. D'Alton, Westesen, and Gallik testified that it was impossible to segregate the time between the contract claim and negligence claim. It is not possible to segregate the time that was spent on the contract claim from the time that was spent on the negligence claim. (Findings of Fact, Conclusions of Law and Order Re: Attorney Fees, Docket # 220, DiMarzio Appendix # 3, p. 9).

Mr. Westesen, who started out representing CMC, testified that his attorney's fees were $14,217.00. D'Alton fees, while working at the Brown Law firm and then the D'Alton Law firm, were $89,820.42. (Findings of Fact, Conclusions of Law and Order Re: Attorney Fees, Docket # 220, p.3, Findings 6 and 8, DiMarzio Appendix # 3). Based on the district court's Conclusion of Law that the attorney's fees could not be segregated, and the district court's finding that CMC was the prevailing party under the contract, the district court should have awarded CMC its attorney's fees.

However, DiMarzio, at the end of the attorney's fee hearing, filed a bench brief in which he argued that attorney's fees could not be awarded to CMC because CMC's insurance carrier had a contractual duty under the negligence claim to defend CMC. (DiMarzio's Bench Brief Regarding Attorney's Fees, Docket # 215). The district court accepted DiMarzio's "novel" theory and thereby denied all but $6,943.00 of CMC's attorney's fees.

Whether a party is entitled to recover attorney's fees is a question of law. This Court reviews a district court's conclusions of law pertaining to the recovery of attorney's fees to determine whether those conclusions are correct. *Transaction Network v. Wellington Techs.*, 2000 MT 223, P17, 301 Mont. 212, 7 P.3d 409. Here, the district court's erred as a matter of law when it denied the bulk of CMC's attorney's fees.

In its February 3, 2010, Order, the district court held because the DiMarzio's negligence claim triggered the duty to defend, CMC was not entitled to attorney's fees. (Findings of Fact, Conclusions of Law and Order Re: Attorney Fees, Docket # 220, DiMarzio Appendix # 3, Conclusion of Law # 12, p. 13). However, the district court acknowledged no legal precedent existed for its legal conclusion denying CMC its fees. The district court wrote:

> 19. Crazy Mountain suggests that by raising the issue of the insurance coverage at this stage of the proceeding that DiMarzio is

> seeking to have the Court reconsider its decision that Crazy Mountain is the prevailing party and is entitled to its attorney's fees. The Court disagrees. The Court's function is also to determine whether the attorney's fees for the contract claim and negligence claim can be segregated. Although the parties have agreed that as a matter of fact it is impossible to segregate the claims for purposes of the work done by D'Alton, the Court agrees with DiMarzio's analysis that under the unique circumstances of this case and as a matter of law, the attorney's fees paid by Farmers Insurance on behalf of Crazy Mountain were based upon a contractual duty between Farmers Insurance and Crazy Mountain. As Crazy Mountain pointed out, DiMarzio has raised a novel issue. Neither party has cited, nor has the Court found, any case with facts similar to the facts in this case. This Court does not consider DiMarzio's argument to be an attempt to reconsider the Court's previous decision, but considers it to be an unprecedented argument to resolve the issue of segregation of fees when multiple claims, including a negligence claim, are at issue and there is insurance defense for the negligence claim. (Findings of Fact, Conclusions of Law and Order Re: Attorney Fees, Docket # 220,p. 15, Conclusion of Law, # 19, DiMarzio Appendix # 3).

CMC agrees that DiMarzio's argument is unprecedented. However, Montana has controlling law and the district court erred by not following controlling law.

With regard to the recovery of attorney's fees, the contract between CMC and DiMarzio is clear, and therefore the district court is bound by its terms. *Doig v. Cascaddan*, 282 Mont. 105, 112, 935 P.2d 268, 272 (1997). Here, the Cost Plus contract between DiMarzio and CMC stated: "In the event any dispute arises between the parties to this agreement, the prevailing party shall be entitled to their costs and attorney's fees." (Cost Plus contract, DiMarzio Appendix #5, p. 5). The district court

held that CMC was the prevailing party. (District Court's October 27, 2009, Order on Attorney's Fees, Docket # 209, p.5, DiMarzio Appendix # 2). Therefore, CMC as the prevailing party was entitled to its reasonable attorney's fees. *Doig v. Cascaddan*, 282 Mont. 105, 112-113, 935 P.2d 268 (1997).

Additionally, the district court erred because there is nothing in the record that the negligence claim triggered the duty to defend. Interestingly, at the hearing on the attorney's fee, the Court requested the Reservation of Rights letter from coverage counsel. The Reservation of Rights letter was provided to the district court. (Reservation of Rights Letter, Attached, Docket # 216).

What is clear from the Reservation of Rights letter is the negligence claim did not trigger the duty to defend. (*See*, Reservation of Rights Letter, Docket # 216). Indeed, no facts exists that the insurance carrier defended the case due to the negligence claim. The district court merely made an assumption that the negligence claim triggered the defense by CMC's carrier. Indeed, on November 28, 2005, coverage counsel stated in the Reservation of Rights letter that no coverage existed. However, a defense was being provided because the duty to defend is broader than the duty to indemnify. (Reservation of Rights Letter, Attached, Docket # 216).

The duty to defend is independent from and broader than the duty to indemnify. An insurer's duty to defend arises when an insured sets forth facts which represent a

risk covered by the terms of an insurance policy. *Farmers Union Mutual Insurance Co. v. Staples*, 2004 MT 108 PP20-21, 321 Mont. 99, 90 P.3d 381. *Staples* requires an insurer to liberally construe the allegations in the Complaint. The insurer must defend "unless there exists an unequivocal demonstration that the claim against the insured does not fall under the policy's coverage." *Geraldine v. Montana Mun. Ins. Auth.*, 2008 MT 411, P11, 347 Mont. 267, 198 P.3d 796.

In the Reservation of Rights letter coverage counsel stated the following to CMC:

> DiMarzio's complaint details a significant number of allegations, which largely refer to defective or deficient work. Such claims should not qualify as an "occurrence" as defined by the policy. Further, most of DiMarzio's claims fall specifically within the exclusions referenced above. . . . Since fact questions may exist, the company will defend under a strict reservation of rights. (Reservation of Rights Letter, Attached, Docket # 216).

From this record, the district court did not need to assume how CMC's carrier was approaching the case. The Reservation of Rights letter stated that there was no coverage, but because fact issues may exist CMC's insurance carrier, following the *Staples* holding, defended CMC. With this uncontested facts in the record and not considered by the district court, the district court erred by denying CMC most of its attorney's fees.

B. The District Court Erred by Denying Cmc's Attorney's Fees on Equitable Grounds.

The district court also denied CMC its attorney's fees on equitable grounds. The district court held:

> 15. The foregoing result is also reasonable on equitable grounds. This Court has broad discretion on determining what fees are reasonable in any given case (citation omitted). Moreover, the reasonableness of attorney fees must be ascertained under the facts of each case. Plath par. 36.
>
> 17. Independent of the foregoing analysis, the Court recognizes that if the fees generated by D'Alton were awarded to Crazy Mountain, Crazy Mountain would receive a windfall as it did not incur nor pay the fees. In this regard, they are not attorney's fees incurred by Crazy Mountain as contemplated by the Contract. In addition, if the fees were awarded by Crazy Mountain, but eventually returned to Farmers Insurance, Farmers Insurance would also receive a windfall because it had a contractual duty to defend the negligence claim irrespective of outcome, and lost that claim. For Farmers Insurance to receive the fees would not only be unjust as it was simply fulfilling its contractual duty to Crazy Mountain, but would also be unreasonable.

The district court's position is inconsistent with its October 26, 2009, Order. Additionally, the conclusions in paragraphs 15 and 17 ignore Montana law which holds the prevailing party is entitled to attorney's fees.

Regarding CMC's insurance carrier receiving a windfall, the district court's proclamation that CMC's insurance carrier cannot be reimbursed for its attorney's fees is not supported by Montana law. This is no legal support for the notion that because

insurance company paid the bulk of the attorney's fees the opposing party should not reimburse those fees. Additionally, the district court never analyzed the contractual relationship between CMC and its insurance carrier on the attorney fee issue. Again, the district court assumes what may happen.

Moreover, DiMarzio never presented facts to the district court to invoke equity. At a minimum, DiMarzio must set forth facts which appeal to the conscience for the court to deny attorney's fees on equitable grounds. *Glacier Park Co. v. Mountain Inc.*, 285 Mont. 420, 427, 949 P.2d 229, 233 (1997). DiMarzio offered no evidence, such as financial hardship, for the district court to rule under the principle of equity that DiMarzio should not pay the attorney's fees.

The district court proclaims that if CMC or its carrier received attorney's fees from DiMarzio it would "unjust." There is nothing "unjust" in receiving attorney's fees when CMC prevailed under the contract claim. Equally compelling, it is not unjust for CMC and the insurance carrier to receive reasonable attorney's when a year and a half before the trial, CMC made a $10,000.00 offer of judgement which was rejected by DiMarzio. DiMarzio then forced CMC and its carrier to spend the money to defend and try this matter over six days in August and September of 2009 only for DiMarzio to receive less from the jury than what was offered in March of 2008.

While DiMarzio believes it is worth spending $250,000 to defend a case that could have been settled for a fraction of the defense costs, CMC and its carrier took the

opposite approach by offering DiMarzio more money than his claim was worth.

Additionally, CMC has not appealed the jury's finding of negligence. CMC also has not contested reducing Mr. Westesen's fee down to $6,943.00. CMC is simply requesting this Court reverse the district court's February 3, 2010, Order, and award to CMC its attorney's fees in the amount of $89,820.42 in addition to the $6,943.00.

CONCLUSION

For all of the foregoing reasons, the Judgment should remain in place except for the district court's decision to deny CMC's the bulk of its attorney's fees. On that issue, CMC respectfully requests the Court reverse the Judgment to the extent that the district court erred by refusing to award CMC $89,820.42 in attorney's fees. Additionally, CMC requests this Court award it reasonable attorney's fees expended on this Appeal pursuant to *Boyne v. Lone Moose*, 2010 MT 133, PP 27-28, 356 Mont. 408.

DATED this 21st day of July, 2010.

By: _____

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(a)(b) of the Montana Rules of Appellate Procedure, I certify that Cross Appellant/Appellee's Opening Brief and Answer Brief are printed with a proportionally spaced Times New Roman text typeface of 14 point; is double spaced; and the word count calculated by WordPerfect X3 for Windows, is 9682 words, excluding Certificate of Service and Certificate of Compliance.

By: 

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The undersigned does hereby certify that a true and correct copy of the foregoing was served upon the following on the 21st day of July, 2010, by U.S. mail, postage prepaid and addressed as follows:

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